Supreme Court
FILED

(1)

99 575 OCT - 4 1999

No._____ OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

MORETON ROLLESTON, JR. LIVING TRUST,ET AL,
Petitioners,

vs.

ESTATE OF REBECCA WIGHT CHERRY SIMS,
JOHN RANDOLPH CHERRY, EXECUTOR,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

PETITION FOR WRIT OF CERTIROARI

Moreton Rolleston, Jr.
Attorney for Petitioners
Georgia Bar No. 613700
2035 Garraux Rd., N.W.
Atlanta, Georgia 30327
404/ 237-03666

54 P

QUESTIONS PRESENTED FOR REVIEW

1.

The order of the trial court violated the principle set forth in **Grupo Mexicano de Desarrillo, S.A., et al, vs. Alliance Bond Fund, Inc. Et Al**, No. 98-231which was decided by this Court on June 17, 1999 (hereinafter "**Grupo**"). (U.S. Law Week, Vol. 67, page 4490) The trial court issued a temporary and permanent injunction against the Petitioners (hereinafter "Trust") in a lawsuit brought by a creditor (Respondent) which prevented Trust from disposing of any of its assets. **Grupo** held as follows:

> "Because such a remedy was historically unavailable from a court of equity, we hold that the District Court had no authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of respondents' contract

claim for money damages. We reverse the judgment of the Second Circuit and remand the case for further proceedings consistent with this opinion."

2.

The opinion of the Court of Appeals of Georgia (A-1) constitutes impermissible restrain of trade and places a destructive burden on interstate commerce. The Court held that the owner of real estate could not convey good title while a claim against the owner was pending in court unless the owner had not only sufficient assets to cover the pending claim but also assets whose value would exceed any possible other claims for damages. Such a requirement would not only chill the sale of real estate but would also place a requirement which could not even be fulfilled in most cases.

The first question for review is whether the lower court violated the principal enunciated in **Grupo**

The second question for review is whether the requirement of the lower court that a seller of real estate must have assets to cover any possible claims violated the Commerce Clause of the U.S. Constitution. (Article 1, Paragraph 8, U.S. Constitution)

LIST OF PARTIES

Moreton Rolleston, Jr. Living Trust, Moreton Rolleston, Jr. Individually, Moreton Rolleston, Jr as Trustee (Petitioners).

TABLE OF CONTENTS

Page(s)

1. Questions Presented

   For Review..... (i)

2. Table of Authorities.....(v)

3. Statutes and Constitutional

   Provisions.....(vi)

4. Grounds on Which Jurisdiction-

   is Envoked..... 2

5. Date of Opinion of the Court of

   Appeals of Georgia..... 5

6. Statutory Jurisdiction..... 2

7. Appendix A..... A-1

8. Appendix B..... B-1

TABLE OF AUTHORITIES

Page

CASES

Gormley vs. Askew, 18

177 Ga. 554, headnote 1

Graves vs. Horton, 18

132 Ga. 786

Grupo Mexicano de Desarrillo,

s.a., et al, vs. Alliance Bond

Fund, Inc. Et Al (i), (iii), 3,

N. 98-231 5, 8

Kessler vs. Veal 18

182 Ga. Apps 444, at page 449

Mitchell vs. Langley 18

148 Ga. 244 at page 246

Pharr vs. Pharr, 17

206 Ga. 354, p. 360

Roach vs. Roach, 18

212 Ga. 40, p. 42

Stokes vs. McRae, et al, 17

247 Ga. 658, page 659

Wallace, Executor, et al vs.

Williams, 17

212 Ga. 692, page 696

Warren vs. Citizens National Bank

of Danville, Ky. 17

145 Ga. 503

STATUTES

	Page
28 U.S.C. 1257	2
O.C.G.A. § 18-2-22 (3)	8, 9

CONSTITUTIONAL PROVISIONS

Article 1, Paragraph 8, U.S. Constitution	(iii), 2

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

======

MORETON ROLLESTON, JR. LIVING TRUST,ET AL,

Petitioners,

vs.

ESTATE OF REBECCA WIGHT CHERRY SIMS, JOHN RANDOLPH CHERRY, EXECUTOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

The trial court granted a Motion for Summary Judgment in favor of the Respondent (Sims Estate). The Court of Appeals of Georgia affirmed the trial court's ruling and denied a Motion

for Reconsideration. A Petition for Writ of Certiorari was filed in the Georgia Supreme Court which was denied by that Court on September 17, 1999.

The jurisdiction of this Court to review the judgment of the Court of Appeals of Georgia is invoked under 28 U.S.C. ¶1257.

Grounds for jurisdiction is violation of Commerce Clause of U.S. Constitution.

STATEMENT OF CASE

Facts Re First Question

Sims Estate filed a damage suit against the Trust and Petitioner Rolleston. While that damage suit was pending, the lower court issued a temporary and permanent injunction against the Trust which prevented any sale of property while

the lawsuit was pending. That order was issued in 1997 and is still in effect.

In **Grupo** case, this court held "that the District Court had no authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of Respondent's contract claim for money damages."

The lawsuit in which the injunction was issued by the trial court was against Moreton Rolleston, Jr. Living Trust and Moreton Rolleston, Jr. Individually and as Trustee of the Trust. On February 27, 1995, Moreton Rolleston, Jr. established the Trust and conveyed all of his real and personal property to the Trust. Each piece of real estate was individually conveyed by deeds by Rolleston to the Trust.

STATEMENT OF CASE

Facts Re Second Question

The judgment of the Court of Appeals of Georgia held that the Trust could not make a valid sale of real estate unless the Trust proved that it had sufficient assets to pay the damages sought in the pending lawsuit and **also sufficient assets to cover any other possible claims**. (A-8) ruling of the Court of Appeals was not contained in the order of the trial court.

This opinion of the Court of Appeals is also contrary to the established law in Georgia, which will be cited hereinafter in Argument.

The federal question regarding interstate commerce was first raised in the Petitioners'

Motion to Reconsider which was filed with the Court of Appeals of Georgia on April 20, 1999 requesting a review of the opinion of the Court of Appeals (dated April 12, 1999) which is challenged by this Petition For Writ of Certiorari. Federal question also raised in Petition for Certiorari in the Georgia Supreme Court.

ARGUMENT

First Question

The Order of the trial court granted a temporary and permanent injunction prohibiting the sale of any assets by the Trust. This order was issued in 1997 and is still in effect. This order is completely contrary to the opinion of this Court in **Grupo,** which reads as follows:

"the District Court had no authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of Respondent's contract claim for money damages".

We respectfully refer the Court to additional portions of the judgment as indicated by the page numbers.

"Respondents sought breach of contract damages of $80.9 million, and requested a preliminary injunction restraining petitioner from transferring the Toll Road Notes or Receivables (Page 3)." The District Court and the Second Circuit Court of Appeals upheld the injunction.

"It was well established, however, that, as a general rule, a creditor's bill could be brought only

by a creditor who had already obtained a judgment establishing the debt (Page 10)".

"The rule requiring a judgment was a product, not just of the procedural requirement that remedies at law had to be exhausted before equitable remedies could be pursued, but also of the substantive rule that a general creditor (one without a judgment) had no cognizable interest, either at law or in equity, in the property of his debtor, and therefore could not interfere with the debtor's use of that property (Page 11)."

Succinctly stated: **Grupo** could not be enjoined from selling its property before the creditors secured a judgment.

We submit that the **Grupo** ruling applies to the instant case and that the Trust had every right to transfer the property to anyone before Respondent secured a judgment in the trial of the case. The injunction issued by the trial court and upheld by the Court of Appeals was invalid.

ARGUMENT

Second Question

The order of the Court of Appeals constitutes impermissible restraint of trade and places a destructive burden on interstate commerce.

The Official Code of Georgia Annotated, § 18-2-22 (3) reads as follows:

"The following acts by debtors shall be fraudulent in law against **creditors** and others and as to them shall be null and void:

(3) Every voluntary deed or conveyance, not for a valuable consideration, made by a **debtor** who is **insolvent at the time of the conveyance**."

(Emphasis added)

The Court of Appeals, however, placed an even more severe requirement. The Court of Appeals held that "insolvency of the Debtor is determined by ascertaining whether he retained sufficient assets to satisfy his obligations after the transfers.(A- 8) Rolleston was aware of the pendency of the Estate's claims against him by which it sought millions of dollars in damages, and

he did not retain sufficient assets to satisfy any award against him."

No sale of real estate would be possible if the seller has pending against him a suit for damages. There is no way, prior to trial, to determine the extent of liability for such damages. There is no way to predetermine what a jury or a court will award.

To be able to sell real estate or other assets the seller will always have to prove that he had retained sufficient assets to cover pending claims and possible claims for damages. No title insurance company would issue a title policy without including an exception regarding seller's ability to pay pending or known claims for damages.

Seller would always have to retain assets equal to the stated amounts of alleged damages and also equal to claims for general damages to be determined by a jury. For instance, if seller has been sued for personal injury arising out of an automobile accident, the amounts of damages is strictly a jury question.

And lawsuits go on and on and for years in many cases.

So, while litigation proceeds, seller can not convey good, marketable title unless he is solvent and maintains, after a conveyance, sufficient assets to satisfy any damage judgment in an unknown amount.

In 1998 there were 3,702 civil lawsuits, excluding divorce, filed in the Fulton Superior

Court of Georgia. If the judgment of this court is allowed to stand, all those 3,702 defendants could not transfer good and marketable title without having assets sufficient to cover the damages sought in these lawsuits, a figure that was impossible to predetermine before trial. For instance, none of these defendants could sell his house without complying with judgment of the Court of Appeals and none of them would be able to determine in advance the amount of assets necessary to cover future damages.

Every year over 100,000 people move to the metropolitan area of the City of Atlanta. Many of these people are from out of state. Many of these people buy homes in this area. The effect of this judgment would prevent any seller, against whom a

damage suit is pending, from conveying good and marketable title to the out-of-state purchaser. This is another example of how this judgment would be a burden on interstate commerce because the sale of property in Georgia to an out-of-state purchaser would be impossible.

This judgment will produce chaos in the real estate field and would effect corporations, partnerships and trusts just as much as individual sellers.

A Georgia seller of real estate located in another state, who is subject to a lawsuit, could not pass good title because neither the seller nor the title insurance company could determine the value of assets which the seller must retain to cover any

damages. This would place an insoluble burden on interstate commerce.

How much assets would any otherwise solvent doctor need to retain to cover malpractice damages?

How much assets would a corporation need to cover multiple sex discrimination suits?

Take the case of an ordinary citizen who has an automobile wreck. He probably has no more than $500,000 coverage. Three people are killed in the wreck and three lawsuits are filed. The seller has a prior contract to sell his house. How much assets must this seller possess in order to sell his house so that the purchaser from New York can get title insurance? And if the seller doesn't have sufficient cash to cover the damages claimed (even

though the seller is solvent) who will determine the value of the assets of the seller in order for the New York purchaser to get good title. In the meantime, what happens to the sale? Nothing. Multiply that by the lawsuits filed in Fulton County in 1998.

If you erase from the opinion of the Court of Appeals that the debtor must retain sufficient assets to satisfy his obligations after the transfers, then Moreton Rolleston, Jr. was solvent at the time of the transfer of real estate from him to the Trust. Even the Respondent's (Sims Estate) own evidence showed that Rolleston, at the time of the transfer, was worth over $5 million. Their own real estate appraiser swore that Rolleston's house was worth $3 ½ million and, to top it off, the Estate originally offered to settle the case for $300,000. This offer

was made before the transfer of title from Rolleston to the Trust. Was the $300,000 the figure Rolleston should have retained as part of his assets after the transfer of real estate? The evidence showed that he retained $500,000 from the sale of German Marks.

If a seller were required to retain sufficient assets to meet damages in a pending lawsuit, would the existence of a malpractice insurance policy be considered sufficient assets? And, if so, how much insurance would the seller have to have to meet the criteria of the judgment of Georgia Court of Appeals? In this case, Rolleston had malpractice insurance with a maximum in each of six policies of $3 million dollars. Was that enough to satisfy the criteria established by this judgment?

The ruling of the Georgia Court of Appeals would create such a problem in determining the amount of assets that a defendant debtor must retain in order to convey legal title to real estate as to impose a restraint on trade and a unconstitutional burden on interstate commerce.

The Official Code of Georgia Annotated § 18-2-22 (3) (supra, pg. 8-9) has been interpreted and upheld by the Georgia Supreme Court in the following cases:

Pharr vs. Pharr ,206 Ga. 354, p. 360

Wallace, Executor, et al vs. Williams, 212 Ga. 692, p. 696

Stokes vs. McRae, et al, 247 Ga. 658, p. 659

Warren vs. Citizens National Bank of Danville, Ky, 145 Ga. 503

Gormley vs Askew, 177 Ga. 554, headnote 1

Roach vs. Roach, 212 Ga. 40, p.42

Mitchell vs. Langley, 148 Ga. 244 at page 246

Kessler vs. Veal, 182 Ga. Apps 444, at page 449

Graves vs. Horton, 132 Ga. 786

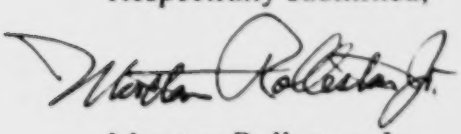
CONCLUSION

We submit that **Grupo** controls this case and, if that be true, the injunction orders issued by the trial court were improper and invalid.

We further contend that the judgment of the Court of Appeals of Georgia, to wit, that a seller must own sufficient assets after a sale equivalent to

all possible damage claims against the seller, places an undue and illegal burden on interstate commerce.

Respectfully submitted,



Moreton Rolleston, Jr.
Attorney for Respondent
Georgia Bar No. 613700

2035 Garraux Rd., N.W.
Atlanta, Ga. 30327
404/ 237-3666

APPENDIX

Appendix A

THIRD DIVISION

BLACKBURN, P.J., BARNES, J.,

SENIOR APPELLATE JUDGE

HAROLD R. BANKE

April 12, 1999

In the Court of Appeals of Georgia

A99A0195. A99A0549. A00A0823.

ROLLESTON v CHERRY, et al

BLACKBURN, Presiding Judge.

In case No. A99A0195 and Case No. A99A0549 Moreton Rolleston, Jr., individually, Moreton Rolleston, Jr., Living Trust and Moreton Rolleston, Jr., as trustee and/or beneficiary (referred to collectively as the Trust) appeals the trial court's order denying its motion for summary judgment and

granting the motion for summary judgment of the Estate of Rebecca Wight Cherry Sims and John Randolph Cherry (referred to collectively as the Estate). The Trust further contends that the trial court's dismissal of it first notice of appeal whereby it attempted to appeal the denial of a previous motion for summary judgment was erroneous. The Trust also appeals the trial court's denial of its motion to set aside the judgment. In Case No. A99A0789, the Trust appeals the trial court's order holding Rolleston in contempt of court and finding that a lease from the Trust violated the interlocutory injunction. In case No. A99A0823, the Trust appeals the trial court's order which required the posting of a $6 million supersedeas bond.

These combined cases are a continuation of litigation by Rolleston and the Trust against the

Estate. In Rolleston v. Cherry, 226 Ga. App. 750 (487 SE2d 354) (1997), this Court affirmed $5.2 million in judgments against Rolleston for professional negligence, breach of fiduciary duty, fraud, and contribution relating to his representation of Rebecca Wight Cherry Sims. After the verdict, but before the judgment was entered, Rolleston recorded deed in Fulton County and Glynn County transferring title to all of his property from his name into the name of the Moreton Rolleston, Jr. Living Trust. He also transferred all of his personal property, including cash assets into the Trust with the exception of his interest in a $500,000 certificate of deposit in German Deutsch marks, which was put into the Trust on a later date. Thereafter, the Estate filed the present case seeking to set aside the transfers of Rolleston's property into

the Trust as fraudulent. The Estate also sought and received an interlocutory injunction prohibiting any transfer of real or personal property from the Trust without approval of the court during the pendency of the underlying suit.

Thereafter, the Trust attempted to directly appeal the trial court's denial of its first motion for summary judgment; but as it was an appeal from an interlocutory order, the trial court dismissed Rolleston's notice of appeal. Subsequently, the trial court entered an order granting the Estate's motion for summary judgment and denying the Trust's third renewed motion for summary judgment. By such order, the trial court reserved the Estate's claims for permanent injunction, damages, and attorney fees for trial. These appeals arise out of

the trial court's order on the parties' motions for summary judgment.

Case Nos. A99A0195 and A99A0549

1. The Trust contends that the trial court erred in granting the Estate's motion for summary judgment in that it misapplied OCGA § 18-2-22 and it failed to consider certain evidence.

Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. OCGA § 9-11-56 ©. A de novo standard of review applies to an appeal from a grant of summary judgment, and we view the evidence, and all reasonable conclusions and inferences drawn from it, in the light most favorable to the nonmovant. Rice v. Huff, 221 Ga. App. 592, 593 (472 SE2d 140) (1996).

Matjoulis v. Integon Gen. Ins. Corp., 226 Ga.App. 459 (1) (486 SE2d 684) (1997).

OCGA § 18-2-22 provides:

> The following acts by debtors shall be fraudulent in law against creditors and others and as to them shall be null and void: (1) Every assignment or transfer by a debtor, insolvent at the time, of real or personal property . . . to any person . . . where any trust or benefit is reserved to the assignor or any person for him; (2) Every conveyance of real or personal estate . . . of any description had or made with intention to delay or defraud creditors, where such intention is known to the taking party; . . . and (3) Every voluntary deed or conveyance, not for a valuable consideration, made by a debtor who is insolvent at the time of the conveyance.

The Estate need not establish a claim under each division of OCGA § 18-2-22, as proof of the elements in any division requires that the conveyances to the Trust be declared null and void. See Dearing v. A.R. III, Inc, 266 Ga. 301, 303 (2) (466 SE2d 565) (1996).

(a) Rolleston argues that OCGA § 18-2-22 does not apply to the transfers he made to the Trust because, at the time of the transfers, he was not indebted to the Estate. However, this argument overlooks the precise statutory language and a long line of case authority. By its specific terms, the statute applies to "creditors and others".

These "others' include plaintiffs with claims against debtors "liable as tortfeasors, or otherwise . . .for an unascertained damage to person or property, so far as fraudulent conveyances are

concerned." Westmoreland v. Powell, 59 Ga. 256, 258 (1877). In 1895, the legislature put back in the statute the words declaring certain acts to be fraudulent in law against creditors "and others" . . . using as it source Westmoreland. Kesler v. Veal, 182 Ga. App. 444, 449 (356 SE2d 254), aff'd in part and rev'd in part, 257 Ga. 677 (362 SE2d 214) (1987). Therefore, OCGA § 18-2-22 is applicable to Rolleston and the transfers he made to the Trust. See also Mercantile Nat. Bank v. Aldridge, 233 Ga. 318, 319-320 (210 SE2d 791) (1974).

(b) Rolleston argues that OCGA § 18-2-22 (3) does not apply to the transfers he made to the Trust because he was not insolvent at the time of the transfers. However, insolvency of the debtor is

determined by ascertaining whether he retained sufficient assets to satisfy his obligations after the transfers. See Chambers v. C & S Nat. Bank, 242 Ga. 498, 501-502 (249 SE2nd 214) (1978). Rolleston was aware of the pendency of the Estate's claims against him by which it sought millions of dollars in damages, and he did not retain sufficient assets to satisfy any award against him. The evidence to which the Trust refers merely establishes the amount of assets transferred into the Trust. The amount of assets transferred into the Trust is not relevant in determining whether the debtor was solvent at the time of the transfer. Id. Furthermore, proof of Rolleston's solvency is unnecessary to establish the Estate's claim pursuant to OCGA § 18-2-22 (2). Mercantile Nat. Bank, supra.

Because the trial court did not err in granting the Estate's motion for summary judgment, it also did not err in denying the Trust's motions for summary judgment.

2. The Trust contends that the trial court erred in failing to grant its first motion for summary judgment, arguing that the Estate failed to comply with OCGA § 9-11-56 (e). By this enumeration, the Trust asserts that the Estate failed to respond to its initial motion for summary judgment with any evidence in opposition to such motion. The rust further asserts that its motion for summary judgment established a prima facie case, and that, therefore, summary judgment in its favor was demanded pursuant to OCGA § 9-11-56 (e).

The Trust's argument rests on its assertion that it had presented a prima facie case entitling it to summary judgment. However, as is shown in our discussion in Division 1, the Trust was not entitled to summary judgment as a matter of law, and therefore, the trial court did not err in denying its motions.

3. The Trust contends that the trial court erred in dismissing its initial notice of appeal of the trial court's order denying its first motion for summary judgment. However, as a direct appeal is not available from the denial of a motion for summary judgment, see OCGA § 5-6-34, the trial court did not err in dismissing the Trust's attempt to pursue such a direct appeal. See Attwell v. Lane Co., 182 Ga. App. 813, 814 (1) (357 SE2d 142)

(1987) (trial court empowered to dismiss appeal where judgment not final).

4. The Trust enumerates as error the trial court's order denying its motion to send aside the judgment and motion to dismiss the amended complaint. By this enumeration, the Trust has asserted more than one error.

It is well settled that when an appellant argues more than one error within a single enumeration, this court in its discretion may elect to review none of the errors so enumerated in violation of OCGA § 5-6-40 or elect to review any one or more of the several assertions of error contained within the single enumeration and treat the remaining assertions of error therein as abandoned.

(Citation an punctuation omitted.) Stubbs v. Harmon, 226 Ga.App. 631, 633 (2) (487 SE2d 91) (1997). We will review the first error asserted.

The record makes it clear that the Trust filed a motion to set aside the judgment after the trial court denied its first motion for summary judgment. However, as the Trust's motion was not a proper motion, because there was no judgment to set aside, the trial court's denial of such motion was also not erroneous. Therefore , the Trust's enumeration is without merit.

Case No. A99A789

5. Rolleston contends that the trial court erred in finding him and the Trust in contempt of the temporary injunction against alienation of assets by leasing real estate out of the Trust to a limited partnership.

"Whether a contempt of court has been committed in the violation of an injunctive order, and how it shall be treated, are questions for the discretion and judgment of the court that issued the order, and its discretion will not be interfered with by this court unless there is an abuse of discretion. If there by any substantial evidence from which the judge could have concluded that his order had been violated, his finding to that effect cannot be disturbed by this court, insofar as the sufficiency of the evidence is concerned."

Gen. Teamsters Local Union No. 525 v. Allied Foods, 228 Ga. 479, 483-484 (186 SE2d 527) (1971).

The temporary injunction provides that Rolleston and the Trust are "enjoined from

transferring or conveying any real or personal property without notice to and approval by this Court. This injunction provides that Rolleston and the Trust are "enjoined from transferring or conveying any real or personal property without notice to and approval by this Court. This injunction shall remain in full force and effect until further order of this Court." The interlocutory injunction was entered on July 7, 1995. Before the interlocutory injunction was entered, Rolleston created a limited partnership, the MRJR Limited Partnership (the Partnership), of which he is the sole general partner and the Trust is the sole limited partner. The record contains a lease for 100 years from the Trust to the Partnership of substantial real and personal property described in exhibits attached

to the lease. The lease was filed with the Fulton County Superior Court on August 13, 1998.

The Trust argues that because the lease did not transfer or convey title, it was not a transfer of the property as proscribed by the interlocutory injunction. However,

> a lease of lands for five years or more creates an estate for years and passes as realty in this State. Such an estate may be bought and sold as any other estate, subject to the terms and conditions of the lease. OCGA §§ 44-6-100; 44-6-102; 44-7-1.

(Punctuation omitted.) Paces Partnership v. Grant, 212 Ga. App. 621, 624, (442 SE2d 826) (1994). This type of transfer clearly violated the interlocutory injunction.

[I]f [one] is in doubt as to what acts he may or may not do under the order, he should request a modification or construction of its terms. If he proceeds under his own construction, he does so at his own peril.

Gen. Teamsters,supra at 481. Additionally, we note that "[I]t is the spirit more than the letter of the injunction to which obedience is requires." (Punctuation omitted.) Rapaport v. Buckhead Coach, 234 Ga. App. 363, 365 (2) (506 SE2d 690) (1998).

The trial court determined that no economic purpose appeared on the face of the lease because, pursuant to its terms, the Partnership was required to pay the Trust 50 percent of the net income received in the preceding year. Yet, prior to the lease, the Trust received 100 percent of the net

income. The trial court further determined that the lease was not an arms-length transaction because Rolleston was the Trustee of the Trust and also the general partner of the Partnership. Additionally, Rolleston canceled the lease a few days prior to the hearing on the Estate's motion for contempt. Therefore, the trial court did not abuse its discretion in determining that the temporary injunction was violated by the lease in question.

6. Rolleston contends that the trial court erred in holding him in contempt of court, in sentencing him to jail, and ordering him to pay a fine of $500. Rolleston's enumeration is not supported with argument or citation to authority as required by this Court's Rule 27© (2), and is, therefore, deemed abandoned.

In any event, the trial court found that "Rolleston acted with full knowledge that he was violating [its] order and [was] in willful contempt." The trial court sentenced Rolleston 'to serve ten (10) days in the common jail of Fulton County," but allowed him to purge the contempt by payment of a fine of $500. The trail court's decision in fining Rolleston was within its discretion, and we find no abuse. Therefore, Rolleston's enumeration is without merit.

7. The Trust contends that attorney fees and costs are not recoverable in an action for contempt and that the trial court erred in awarding them to the Estate. The Georgia Supreme Court has held that if a prohibition against attorney fees in contempt proceedings exists, it exists because of "constitutional and statutory limits put on the power

of the courts to punish for criminal contempt" and is therefore limited to criminal contempt actions. Minor v. Minor, 257 Ga. 706, 709 (2) (362 SE2d 208) (1987). See also 1983 Ga. Const., Art. I, Sec II, Par. IV; OCGA § 15-6-8.

"The distinction between criminal and civil contempt is that criminal contempt imposes unconditional punishment for prior acts of contumacy, whereas civil contempt imposes conditional punishment as a means of coercing future compliance with a prior court order." (Punctuation omitted.) Rapaport, supra at 364 (1). The present contempt motion is one for criminal contempt as the trial court's order punishes Rolleston for a pervious violation of the temporary injunction. In Rapaport, we held that :[a]ttorney fees are not included in the permissible sanctions,

and the Supreme Court of Georgia has held that they are not awardable in conjunction with a citation for criminal contempt." Id at 365 (3).

The Estate argues that, because the trial court specifically awarded attorney fees pursuant OCGA § 13-6-11 and not as punishment for the contempt, it did not err in making the award. The Estate distinguishes the cases cited by Rolleston by pointing out that therein, the attorney fees were awarded as either the sole punishment or as further punishment for the contempt rather than upon a separate basis. See Gen. Teamsters, supra (where defendant fined for violation of restraining order and required to pay attorney fees, court found no authority for award of attorney fees); Ragsdale v. Bryan, 235 Ga. 58 (218 SE2d 809) (1975)

("punishment assessed in the form of attorney fees . . .was improper")'; Rapaport, supra (award of attorney fees reversed where only punishment assessed for finding of criminal contempt).

The Estate's argument fails to address our specific holding in Rapaport wherein we found that attorney fees are not awardable in conjunction with a citation for criminal contempt. Id. at 365. Therein, the Court further distinguished civil contempt by noting that in that context, attorney fees were awardable where some other express authority exists. Id. at 365, n.2. Therefore, upon the authority of Rapaport we must reverse the trial court's award of attorney fees on the Estate's motion for contempt.

8. The Trust contends that the trial court erred in requiring a $6 million supersedeas bond. The Trust argues that OCGA § 5-3-24 precludes

---

This issue was previously raised by the Trust in a motion before this Court. On September 17, 1998, this Court entered an order denying the Trust's motion to reverse the trial court's imposition of a supersedeas bond. Such order is hereby vacated and this opinion substituted in its place.

the imposition of a supersedeas bond in the present case. We do not agree.

OCGA § 5-3-24 provides that

> [e]xecutors, administrators, and other trustees, when defending an action as such or defending solely the title of the estate, may enter an appeal without paying costs and giving bond and security as required by Code Section 5-3-22; but, if a judgment should be obtained against such executor, administrator, or other trustee and not the assets of the estate, he must pay costs and give security as in other cases.

However, such Code section governs appeals to superior courts from probate courts, not appeals from superior court to the Court of Appeals. OCGA § 5-6-46 governs the grant of supersedeas bonds on appeals from superior court to the Court

of Appeals. This Code section provides, in pertinent part, that "upon motion by the appellee. . . the trial court shall require that supersedeas bond be given with such surety and in such amount as the court may require." Therefore, pursuant to OCGA § 5-6-46, the trial court did not err in granting the Estate's motion for supersedeas bond.

In summary, in Case Nos. A99A0195 and A99A0549 the trial court's grant of summary judgment to the Estate and its denial of summary judgment to the Trust is affirmed. In Case No. A99A0789, the trial court's finding of contempt and punishment therefor is affirmed; however, its assessment of attorney fees is reversed. In Case No. A99A0823, the trial court's requirement of a $6 million supersedeas bond is affirmed.

Judgment in case Nos. A99A0195, A99A0549, and A99A0823 affirmed, judgment in Case No. A99A0789 affirmed in part and reversed in part. Barnes, J., and Senior Appellate Judge Harold R. Banke concur.

Appendix B

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: September 17, 1999

Moreton Rolleston, Jr.
2035 Garraux Road, NW
Atlanta, Ga. 30327

Case No. S99C1190

MORETON ROLLESTON, JR., et al v. ESTATE OF REBECCA WIGHT CHERRY SIMS, et al.

COURT OF APPEALS CASE NO. A99A0195
A99A0549 A99A0789 A99A0823

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sincerely,

Sherie M. Welch, Clerk